

STATE OF RHODE ISLAND
COMMISSIONER OF EDUCATION

STUDENT C. DOE, by his parent, :
Ms. Doe, :

Petitioner :

v. :

WARWICK PUBLIC SCHOOLS, :

Respondent :

RIDE NO. 21-010A

FINAL DECISION AND ORDER

Held: Petition for an order by parent and primary care-giver of eighteen-year-old autistic child challenging school district's requirement that the parent submit evidence of her own negative coronavirus test to the district every ten (10) days as a condition to her child's continued in-person attendance in his transition program while wearing only a face shield – in lieu of the face mask required of all other students attending school in-person during the coronavirus pandemic – was granted, as: (1) school district failed to meet its burden of proving: (a) that the child's continued in-person attendance wearing only a face shield, as has been the case for six (6) months, was substantially likely to result in injury either to himself or to others, or (b) that it had done all that it reasonably could to reduce the risk that the child would cause injury if the status quo was maintained; and (2) the practice was approved as safe in an independent report by two registered nurses employed at an interagency center created during the COVID-19 pandemic.

Date: April 12, 2021

I. Introduction and Procedural History

On February 24, 2020, Ms. Doe petitioned the Commissioner on behalf of her son, C. Doe, and requested a hearing as well as an interim protective order under R.I. Gen. Laws § 16-39-3.2 to enable her son, an eighteen-year old autistic student enrolled in a transition program operated by the Warwick Public Schools (“Warwick”), to continue wearing a face shield without a face mask while attending the program in-person, even though Warwick requires all other students who are attending school in-person during the coronavirus pandemic to wear a face mask.

A hearing was held before the undersigned Hearing Officer on March 3, 2021. Warwick presented the testimony of its attending physician, Steven Allen Feldman, M.D. Ms. Doe, who appeared *pro se*, relied exclusively upon the facts situated to by the parties, her cross examination of Dr. Feldman, and oral argument. *See* Interim Decision at pp. 4-5 (repeated below at ¶¶ 1-8 for the sake of convenience).

A. The Stipulated Facts

1. Doe is eighteen (18) years of age and is a child with a disability who is both autistic and non-verbal. He resides in the City of Warwick with Ms. Doe – his mother, guardian and primary care-giver (Ms. Doe) – and her husband, a sister and a stepsister.

2. Doe attends a transition program located at the site of the former Drum Rock Elementary School in Warwick, which he has been attending in-person four (4) days a week.

3. Since the beginning of the 2020-21 school year in September, Doe has been permitted to attend school in-person while wearing only a face shield, despite the Warwick

policy mandating that all students, staff and employees wear a face mask at all times while on school grounds.¹

4. Sometime in early February 2021, Warwick's attending physician, Steven Allen Feldman, M.D., informed Ms. Doe that the fact that Doe wears only a face shield without a face mask heightens the risk that Doe will either contract or spread the coronavirus.

5. At a meeting on February 17, 2021 involving Ms. Doe, Dr. Feldman, Doe's teacher and other school officials, Warwick informed Ms. Doe that since Doe was unwilling or unable to tolerate a coronavirus test, it had decided that Doe's family would have to be tested on a regular basis in order for Doe to be able to continue attending school in-person while wearing only a face shield. Ms. Doe was informed that if the family refused to get tested, Doe would be required to attend classes virtually.

6. Ms. Doe indicated that as Doe's primary care-giver, she *might* be willing to be tested regularly, but she said she saw no reason that the entire family needed to be tested, and the February 17 meeting ended with both parties agreeing to consider the matter.

7. Soon thereafter, Warwick informed Ms. Doe that if Doe wanted to continue to attend his program in-person while wearing only a face shield, she would have to agree to provide Warwick with her own negative coronavirus test results every ten (10) days.

8. Ms. Doe did not file a due process complaint under the IDEA prior to filing the instant petition with the Commissioner.

B. The March 3, 2021 Hearing Testimony

The following facts were found by the Hearing Officer following the March 3, 2021 hearing. *See* Interim Decision at 5-7 (repeated below at ¶¶ 9-15 for the sake of convenience).

¹ Although there was testimony affirming the existence of such a policy, the policy itself was not entered into evidence by Warwick.

9. According to his curriculum vitae (Warwick Ex. 1), Dr. Feldman is, *inter alia*, board-certified in pediatric medicine (1969), general psychiatry (1984) and child and adolescent psychiatry (1985), and has been Warwick's Consulting Physician since 1983. In addition, he testified to a breadth of experience that qualified him to provide an expert opinion as to the potential risks posed by Doe's continued attendance in school while wearing only a face shield.

10. Dr. Feldman opined that allowing Doe to continue wearing only a face shield in lieu of the face mask required of all other students without taking the additional precautionary measure of requiring that his primary caregiver provide evidence of her negative coronavirus test every ten (10) days would pose a risk of potential spread to others in the school with whom he might come in contact, and to Doe himself, which Dr. Feldman variously described as "significant," "very grave" and/or "great."

11. He testified that face shields do not catch smaller airborne particles that pass to and from one wearing only a shield, which does not fit as tightly as a mask, an opinion that he claimed was shared by both the Center for Disease Control (the "CDC") and the Rhode Island Department of Health ("RIDOH").

12. Upon cross examination, Dr. Feldman testified that he first learned that Doe was wearing only a face shield sometime in January of 2021, although, as noted, Doe had been doing so for months prior to that time.

13. In addition, Dr. Feldman admitted that he was not personally aware of what specific mitigation and/or accommodation measures, if any, had been attempted by Warwick, other than to suggest that Does' family, and then only Ms. Doe, test regularly and provide negative test results to the District.

14. At the same time, Dr. Feldman opined that he knew of no non-stigmatizing mitigation measure that would preclude the need for Doe’s primary caregiver to provide regular evidence of her negative coronavirus test.

15. Finally, Ms. Doe claimed that the CDC recognized that not every child is able to wear a mask, and she noted that CDC guidance contemplated that exceptions would be made, and provided a link to the CDC’s website, which was admitted into evidence.²

C. The Interim Decision

In the Interim Decision, the Commissioner held that switching to virtual learning would constitute a “change of placement” under the Individual with Disabilities Education Act’s (“IDEA’s”) “stay put” provision. *See* Interim Decision at 2-4 and 8-9, discussing cases interpreting 20 U.S.C. § 1415(j)-(k) and *Regulations Governing the Education of Children with Disabilities* (“Disability Regs.”), 200 R.I. Admin. Code 20-30-6.8.1.S. However, the Commissioner also found that: (1) “Dr. Feldman’s opinion as to the danger posed by Doe’s face shield was wholly lacking in any factual foundation, and thus is of limited utility.” *Id.* at 12; and (2) “Warwick presented absolutely no evidence explaining what, if anything, it did to attempt to accommodate Doe’s inability to wear a mask.” *Id.* The Commissioner therefore concluded that Warwick had failed to meet its burden of proving either that:

- (1) Doe’s continued in-person attendance wearing only a face shield was “substantially likely to result in injury either to himself . . . or to others.” *See id.* at 13, *citing Honig v. Doe*, 484 U.S. 305, 328 (1988); or
- (2) it had “done all that it reasonably can to reduce the risk that [Doe] will cause injury” if he continues to wear only a face shield as he had done since September. *See id.*, *citing Light v Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228 (8th Cir. 1994), cert. denied 515 U.S. 1132 (1995).

See id. at 13.

² *See CDC Guidance for Wearing Masks* at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#anchor_1604967124156.

However, the Commissioner nonetheless concluded that the “bare evidentiary record” did not justify “the extraordinary step of overruling the unrefuted opinion of Dr. Feldman with respect to the gravity of the risk posed, even though the opinion was lacking an adequate factual foundation,” and thus the Commissioner appointed two registered nurses from the Education Operations Center (“EdOC”)³ “to meet with Warwick’s Director of Special Services and Ms. Doe, explore the feasibility of implementing measures to enable Doe to safely attend school in-person with only a face shield, and then report their findings to the Commissioner by the close of business on Wednesday, March 31, 2021.” *See id.* at 13.

D. The Report from EdOC⁴

The nurses from EdOC reported that:

[t]he school staff and mother stated that in mid-February, staff members expressed a concern for increased risk of COVID-19 exposure in school, specifically increased variant transmissibility, due the student’s inability to don a face mask and verbally express COVID-19 symptoms. Staff also expressed they believe he is at a high risk of exposure since he lives with household members who work within the community. As the season has progressed, staff stated the student presented with a runny nose and cough. The student was placed on allergy medication and the symptoms have since resolved. The staff explained that his water intake has increased and that he appears more ‘dry’ since. The remaining concern staff explained is that he demonstrates pica where he chews on strings, clothing, licks his fingers and touches surrounding areas. At the time, the district physician, Dr. Feldman, recommended the student undergo sentential testing to confirm etiology as well as an additional mitigation layer. The student, however, is adverse to any medical related procedure and refuses. It was subsequently recommended that the mother test every 7-10 days due to her role as the primary caretaker and if not, then the student would have to go distance learning. The mother has not denied or accepted the district physician’s recommendation.

EdOC Report at 1. The EdOC Report went on to state that:

- Personal protective equipment: Student was appropriately wearing face shield. All other staff and students in the classroom had face masks on and

³ EdOC is an interagency center located at the Rhode Island Department of Education that brought together expertise from a range of state agencies to collaborate, coordinate, and communicate efficiently during the pandemic.

⁴ The EdOC Report was prepared by two registered nurses who requested anonymity.

wore them appropriately. School reports the staff has an adequate amount of full PPE available if required or preferred.

- Physical distancing: Classroom adequately spaced with desks spaced 6 feet apart. Case student is seated in the back row, far left corner of the room, up against a window and furthest from classroom door. Student is physically spaced 8 feet from student in front and 7 feet from the student to the left. As additional mitigation, there is a physical barrier in place on 3 sides of the student's desk. Student takes bus alone in the morning, but there are other students in the afternoon. Student remains in classroom except for bathroom breaks and a wellness class. Staff reports the student does not move throughout the classroom.
- Handwashing and respiratory etiquette: Student hand sanitizes on the way in and out of classroom, before/after eating and after lavatory use. Hand sanitizer is readily available on the student's desk. The student was able to properly use it with minor assistance or prompting. Student was not exhibiting any symptoms at time of assessment.
- Cleaning and maintaining healthy facilities: School reports custodial staff "deep cleans" school every night. Staff reports classroom is cleaned after lunch.
- Ventilation: School reports classroom ventilation meets requirements at six air exchanged per hour.
- Screening: Staff is required to complete a COVID-19 attestation via google form every morning prior to attending school. Also, parents of students who cannot wear a mask are required to complete a COVID-19 attestation form prior to attending school.
- Testing: The school does not participate in school-based testing at this time. Staff expressed an interest in implementing a testing plan. The mother has not denied or accepted her participation in sentinel screening testing.
- Vaccination: Per mother, student is not vaccinated. School was unable to report staff vaccination status.
- Contact tracing: Staff reported 1 positive case in the classroom from Aug 2020 to time of interview.

Id. at 102.

The recommendations in the Report included the following:

- Personal protective equipment: Per CDC, student meets the criteria of a person who is exempt from the requirement to wear a mask from a disability, for reasons related to the disability from wearing a facemask. Adaptions and alternatives are necessary. Recommend student to continue to wear face shield and continue to attempt to desensitize mask wearing with the strategies outlined below under behavioral strategies. Student/staff must wash hands after removing the face shield. Avoid touching eyes, nose, and mouth when removing it. Clean and disinfect reusable face shields by following CDC face shield cleaning instructions.
- Physical distancing: Continue current physical distancing measures and physical barriers that are in place. No recommended changes at this time.
- Handwashing and respiratory etiquette: Student and staff use proper handwashing and respiratory etiquette. No recommended changes at this time.
- Cleaning and maintaining healthy facilities: Bathroom breaks are properly managed with adequate spacing and sanitation strategies. Classroom sanitation cycle is adequate. No recommended changes at this time.
- Ventilation: School reports classroom ventilation meets requirements at six air exchanged per hour. If safe to do so, open windows and doors. Do not open windows or doors if doing so poses a safety or health risk. Use child-safe fans to increase the effectiveness of open windows. Safely secure fans in a window to blow potentially contaminated air out and pull new air in through other open windows and doors. Consider having activities, classes, or lunches outdoor when circumstances allow.
- Screening: Expand screening to include all students.
- Testing: Implement a school-based asymptomatic testing program as an additional mitigation measure that would allow staff to test students and themselves regularly. If a school-based program is not feasible or desirable, staff that are in direct care of the student should participate. Offer more education to caregiver regarding the purpose of surrogate sentinel testing, and the access of this strategy. Exhaust all avenues for testing the student when symptomatic in order to allow the PCP to link symptoms to seasonal allergies.
- Vaccination: Have a conversation with the student's mother on significance of COVID-19 vaccination for student. Focus on the benefits to risk ratio. Recommend single shot vaccination due to the student's propensity towards extreme medical procedure anxiety. Vaccinate all staff.
- Contact tracing: Continue current COVID-19 protocol.

- Behavioral strategies:
 - * Identify the reaction from student with a familiar care giver if they were to try to conduct testing.
 - * Use role modeling once staff has been trained. This has been proven to be successful in other settings. For example, have the student watch the staff swab themselves. With ongoing repetition, the student may mimic the staff members.
 - * Use the hand over hand method as the student is becoming more comfortable in this safe environment.
 - * Have the student get into any position that they feel safe in when testing is occurring.
 - * Utilize a reward method. The student can earn tokens because of successful “nose tickles”.
 - * Use the same terminology consistently.
 - * Reward behavior with a snack or other positive re-enforcer.
 - * Bring masks into the classroom and have the students decorate or pick out colors that are attractive to them.
 - * Engage the family in strategies that may persuade Doe to cooperate.
 - * Re-educate the mother on the rationale of sentinel testing.

- Best practices: Observe and communicate with other transition programs such as the Pathways Strategic Teaching Center to share best practices. Identify how staff in these programs (where students are reluctant or unable to wear masks) have approached similar circumstances.

Id. at 2-3.

E. The Attempt at a Voluntary Resolution

On March 31, 2021, the parties were provided with copies of the EdOC Report, but were still unable to agree on a path forward. Warwick continued to insist that Ms. Doe provide it with her own negative coronavirus test results every ten (10) days, and Ms. Doe continued to refuse to agree to comply.

On April 6, 2021, a meeting was conducted by Zoom with the undersigned Hearing Officer to explore the possibility of an amicable settlement, after which Ms. Doe emailed the District as follows:

The school district is trying to have me go to a facility to get tested, therefore INCREASING my chances of being exposed and bringing said pathogens into my

home and putting my son and my family at a MUCH HIGHER risk of contracting Covid.

I will be willing to get tested on one condition:

At the expense of Warwick School District, they will send someone qualified to my home in full PPE gear, and test me at my front door. This way, the chances of me potentially going into the public and putting myself and my son at risk, are greatly reduced.

See April 6, 2021 email at 7:14 p.m. from Ms. Doe to Warwick, its counsel and the undersigned Hearing Officer. The offer was not acceptable to Warwick.⁵

On April 12, Warwick's counsel advised that "Superintendent Thornton is extremely concerned that this matter has not been resolved or that we have not received a final decision. This student is now refusing to even wear a shield. Superintendent Thornton is putting the child out of school and on distance learning as of tomorrow." See April 12, 2021 email at 10:01 a.m. from Warwick's counsel to the undersigned Hearing Officer.

III. Decision

As the Commissioner noted in the Interim Decision:

Dr. Feldman claimed that the CDC does not recommend using face shields or goggles as a substitute for masks. See *CDC Guidance for Wearing Masks*, note 4, *supra*.⁶ However, Dr. Feldman failed to mention that the CDC also recognizes that 'wearing masks may not be possible in every situation or for some people,' adding that '[t]hose who cannot wear a mask are urged to prioritize virtual engagement when possible.'

⁵ Indeed, Ms. Doe then wrote that she "was not comfortable having a meeting that involves legal representation for the school without other impartial parties being present." See March 31, 2021 email at 1:13 p.m. from Ms. Doe to Warwick's counsel and the undersigned Hearing Officer.

⁶ Citing William K. Lindsley, et al., *Efficacy of face masks, neck gaiters and face shields for reducing the expulsion of simulated cough-generated aerosols* (Aerosol Science and Technology Volume 55, 2021 - Issue 4); see also *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2* (CDC, Updated Nov. 20, 2020).

See id. at 11.⁷ Indeed, the CDC has expressly stated that “[m]asks should not be worn by . . . [a] person with a disability who cannot wear a mask.” *See CDC, Guidance for Wearing Masks* (Updated Apr. 6, 2021).⁸ And as noted by the U.S. Department of Education:

[s]chools should carefully consider appropriate responses to students with disabilities whose disability may impact their ability to wear a mask, thus ensuring that students with disabilities continue to receive FAPE. For example, if a student’s difficulty wearing a mask is related to an emotional disturbance or sensory disability, the school’s response should be different from a response for a student without a disability. As noted in the previously listed additional Handbook topics, additional resources will be provided to help support districts and schools in creating safe and inclusive learning environments for all students, including students with disabilities, consistent with applicable legal requirements.

U.S. Department of Education, COVID-19 HANDBOOK, *Strategies for Safely Reopening Elementary and Secondary Schools* (Vol. I, 2021) (updated April 2021).⁹

As the noted in the Interim Decision, “[b]alancing the need to provide children with a free, appropriate public education (a “FAPE”) against the heightened risk to others that may result from an accommodation made for the benefit of a disabled child is a difficult and complex task during the coronavirus epidemic, especially when dealing with the need to wear face masks, which have proven to be effective in limiting the spread of the virus.” *Id.* at 14. Thus, the Commissioner is careful not to lightly second-guess those on the front lines who are in the best position to make such decisions.

Here, however, Warwick has failed to establish either that Doe’s continued in-person attendance wearing only a face shield was “substantially likely to result in injury either to

⁷ Thus, the CDC recognized that:

[a]ppropriate and consistent use of masks may be challenging for some children and for people of any age with certain disabilities, including people who have high sensitivity to materials on their faces, difficulty understanding why wearing a mask is protective (such as those with an intellectual disability), or those who have problems controlling their behavior.

Id.

⁸ At <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

⁹ At <https://www2.ed.gov/documents/coronavirus/reopening.pdf>.

himself . . . or to others,” or that it had “done all that it reasonably can to reduce the risk that [Doe] will cause injury” if he continues to wear only a face shield as he had done since September.” *See id.* at 13.

Thus, unless Doe has now, after almost eight (8) months of school, become incapable or unwilling to wear even a face shield, he should be allowed to continue to attend school in person, provided that Warwick continues to follow the practices cited with approval in the EdOC Report.

V. ORDER

For all the above reasons:

1. The Petition of C. Doe for an order to enable him to continue to attend the transition program operated by the Warwick Public Schools at the former Drum Rock Early Childhood Center without a face mask is granted, as long as he wears a face shield; and
2. Warwick Public Schools shall continue to follow the physical distancing, handwashing and respiratory etiquette, as well as the cleaning and ventilation practices, referenced in the EdOC Report; and
3. It is recommended that the District follow all other practices recommended in the EdOC Report to the fullest extent practicable.



ANTHONY F. COTTONE, ESQ.
as Hearing Officer for the Commissioner



ANGÉLICA INFANTE-GREEN,
Commissioner

Dated: April 12, 2021